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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 352

JOHN B. BEARD and HELEN B. BEARD,
Petitioners,
vs.
UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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Petitioners pray that this court grant rehearing of its order of October 27, 1958, denying the Petition for Writ of Certiorari in the above matter and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition filed September 10, 1958, herein.

REASONS FOR GRANTING REHEARING AND ISSUING WRIT.

In denying the petition for rehearing in the above matter, we respectfully state that we believe that this court has overlooked a very serious error, as stated

below, committed by the Court of Appeals, and that the issue here presented involves an important question of wide national interest, namely, uniformity in the application of the Federal Capital Gains Taxing Statutes. This is a matter that affects a very large number of citizens.

We present this petition for rehearing because we believe that to permit the decision of the Court of Appeals to stand condones a very serious and erroneous departure from the usual and accepted concepts of American judicial procedure and if permitted to stand as a precedent will have a far reaching effect in the future on the rights of litigants and their attorneys in the Ninth Circuit to have their cases determined in accordance with the established and just rules of procedure. In reversing the District Court, the Court of Appeals took it upon itself to determine a question of fact that had been determined on clear-cut evidence by the District Court, namely, whether or not the taxpayer was engaged in a particular business, and to substitute its pronouncement on this question of fact, for that of the trial court. The court below, we say with due deference and respect, made itself the trier of fact and not the reviewer of the District Court's determination of a question of fact. If a reviewing court can exercise such an unlimited power in making pronouncements upon questions of fact without seeing or hearing witnesses, as was done here, then litigants and their attorneys will never know which tribunal is going to assume the prerogative of determining factual issues: The trial court which sees and hears the witnesses or the reviewing court which

does not. The court below, in our view, has in this case just gone too far afield by invading the province of the trier of fact. The function of an Appellate Court should be limited to determining questions of law and reviewing questions of fact only from the standpoint of ascertaining whether or not there is any substantial evidence to support the trial court's decision or whether or not under any reasonable view of the evidence the lower court was correct. This case should not be permitted to stand as a precedent to the contrary. The decision of the Court of Appeals in this case reduces the function of the trial court to that of a referee who only takes the evidence and reports it to the court without making any recommendation or judgment. This court in other cases has granted certiorari where a Court of Appeals has gone too far in reversing a lower court on questions of fact. *McAllister v. United States,* 75 S. Ct. 6, 348 U. S. 19, 1954. There this court reversed the Court of Appeals for determining a question of fact respecting negligence in a personal injury action contrary to the determination of the District Court. Likewise, in *Webb v. Illinois Central Railroad Company,* 75 S. Ct. 451, 352 U. S. 512, 1957. There the court granted certiorari where the Court of Appeals reversed the District Court on a factual question respecting an action under the Federal Employers Liability Act. The individual rights of taxpayers and their property are as important as those of litigants seeking damages for personal injuries under the Federal Employers Liability Act or on a plain question of negligence. That there is a need for defining author-

itatively the limits on the scope of factual review in non-jury proceedings has been recognized before. 2 *Stanford Law Review*, 784, 788. Certiorari has been granted before to review questions of fact in tax cases. *Bochm v. Commissioner of Internal Revenue*, 66 S. Ct. 120, 326 U. S. 287. Unlike many petitioners to this court, these petitioners come to this court with a decision by the trier of fact in their favor on a question of fact.

Also, it is not in accord with our concept of American and English jurisprudence that a reviewing court should mislead counsel, as it did in this case, by suggesting that oral argument was not necessary and then determine the case against him solely on a question of fact. This most certainly was done, we are constrained to say, by the court below in the instant case. Government counsel argued this question of fact for a full forty-five minutes without any such suggestion. Is not a taxpayer entitled to have his view of the facts argued without being lulled into thinking that it was not necessary? If there is one issue that commands oral argument, it is an issue of fact. There is nothing to present in advocating a question of fact other than argument.

The importance of oral argument before an Appellate tribunal is well illustrated in the recent American Bar Association Journal of September, 1958, Volume 44, No. 9, page 831.

Further, by permitting the decision to stand, confusion and conflict will continue among the circuits as to the extent of their powers to review questions of

fact in cases of this kind and in the law that should govern the application of the important income tax statute here involved in cases of the kind here in question.

To permit this decision to stand would have far reaching effects. It is important to the individual taxpayers as well as to the government that this taxing statute be applied fairly and uniformly and it is particularly important that gains from the sale of capital assets be taxed no more or no less than intended by Congress. It is important that the favored treatment of capital be preserved for it is that which is used under our system of free enterprise to create new businesses and new employment and thus new profits and earnings to tax.

Dated, Modesto, California,
November 17, 1958.

CARLOS J. BADGER,
Counsel of Record for Petitioners.

EDWARD M. LACY,
ROBERT C. BIENVENU,
FRANCIS O. HOOVER,
Of Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 352

JOHN B. BEARD and HELEN B. BEARD, Petitioners,	)	CERTIFICATE OF COUNSEL RE: PETITION FOR REHEARING
VS.	)	
THE UNITED STATES Respondent.	)	Rule 8892)

I hereby certify that the Petition for Rehearing of the Petition for Writ of Certiorari in the above-entitled cause is presented in good faith and not for delay; and I further certify that it clarifies and enlarges upon the grounds previously urged, which grounds apparently were not stated with sufficient clarity to engage the attention of the court and therefore may be considered not to have been adequately stated and to this extent said petition for rehearing may be considered as presenting grounds not previously stated.

Dated: November 20, 1958.

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